

Testimony of

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Before the Senate Committee on Indian Affairs

**Oversight Hearing on Indian Water Rights:
Promoting the Negotiation and Implementation of Water Settlements in Indian Country**

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I. INTRODUCTION

Chairman Akaka, Ranking Member Barrasso, and members of the Committee, my name is Maria O'Brien and I am an attorney with Modrall Sperling, P.A. in Albuquerque, New Mexico. I am testifying on behalf of the Western States Water Council (WSWC) in my official capacity as the Chair of the WSWC's Legal Committee. I appreciate the opportunity to discuss the importance of Indian water rights settlements to western states and thank you for your leadership in addressing this important issue.

The WSWC is a non-partisan advisory body on water policy issues closely affiliated with the Western Governors' Association (WGA). Our members, including myself, are appointed by the Governors of 18 states. My testimony is based on official WSWC reports, statements and positions, as well as efforts involving the WSWC's longstanding collaboration with the Native American Rights Fund (NARF) to support federal policies that facilitate the negotiated resolution of Indian water rights claims. I will emphasize just a few of our interests and concerns and have attached the WSWC's most recent position on Indian water rights settlements (No. #336).

For three decades, the WSWC, WGA, and NARF have worked together as part of an Ad Hoc Group on Indian Water Rights to support the negotiated settlement of Indian reserved water rights claims. Although Congress has authorized 27 Indian water rights settlements, the water rights claims of many more tribes remain unquantified and the cost and scope of resolving these rights is increasing sharply. However, obtaining federal funding necessary to resolve these claims has proven to be difficult. Providing the federal funding needed to negotiate and implement Indian water rights settlements is a trust obligation that is critical to the well-being of western states, Indian Country, and the Nation as a whole. Funding is also necessary to settle major claims against the United States.

II. THE PRIOR APPROPRIATION AND INDIAN WATER RIGHT CLAIMS

For well over a century, the doctrine of prior appropriation has governed the allocation of water in most western states. Under this system, the right to divert water from a stream is based on the notion of "first in time, first in right," which means that the first parties to physically divert and use water for "beneficial use" have priority to use the water. Thus, senior water right

holders with earlier priority dates (the date the water was first put to beneficial use) can force users with junior priority dates to curtail or stop their use in times of shortage.

Most non-Indian water development in the West occurred after the federal government entered into treaties with tribes to establish permanent homelands, or reservations, for the tribes. These treaties typically did not specify the tribes' water rights, an issue which the U.S. Supreme Court addressed in its 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908). The Court held that tribal treaties impliedly reserved water rights necessary to meet the purpose of a tribe's reservation. These reserved rights, or "*Winters* rights," and other kinds of tribal water rights arising under federal law, exist as federal enclaves within state legal systems and differ from prior appropriation rights because they arise independently of beneficial use; are indeterminate in amount until adjudicated; are measured by the present and future supplies needed to fulfill the purpose of a reservation instead of past uses; and have priority dates that correspond to the date the federal government created the reservation.

III. THE NEED TO RESOLVE TRIBAL WATER RIGHTS CLAIMS

Resolving Indian water rights claims is critical for western states, because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully-appropriated for non-Indian uses. The unquantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can serve as an impediment to local, state and regional economic development. Given that water supplies are increasingly stressed due to prolonged drought, reduced snowpack, and other factors, including growing demands, quantifying Indian water rights claims and determining their impacts on state-issued rights is essential for western states to address increasing water demands related to growing populations and to provide certainty as to state-based water uses. Moreover, the quantification of tribal claims may provide a mechanism to allow for water marketing between tribes and non-Indian users such as fast growing western cities.

IV. WHY SETTLEMENTS ARE PREFERRED

Settlements are the preferred manner of resolving tribal water rights claims. First, they give states and tribes certainty and control over the outcome of water rights adjudications, whereas litigated outcomes are fraught with uncertainty. Second, settlements build positive relationships between states, tribes, and the federal government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication. Third, Indian water rights claims are extremely complex and settlements enable tribes and non-Indian neighbors to craft mutually-beneficial solutions tailored to their specific needs, including the development of water infrastructure and water markets which increase available water supplies for all users. Fourth, settlements can provide mechanisms that enable tribes to turn quantified rights into "wet water," while litigation typically provides tribes with "paper rights" only. Fifth, settlements are often less costly and time-consuming than litigation, which can last for decades and can be extremely expensive for all parties.

V. THE NEED FOR FEDERAL FUNDING

The federal government holds Indian water rights in trust for the benefit of the tribes and is joined as a party in water rights adjudications involving tribes. This means that the federal government has a fiduciary duty to protect tribal water rights and has a responsibility to help tribes adjudicate their rights and ensure that settlements are funded and implemented. It also means that each settlement must be authorized by Congress and approved by the President.

In many cases, tribes have significant breach of trust claims against the federal government for failing to protect their water rights. Generally, as part of a settlement, tribes will waive these claims and a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and/or tribal fishery restoration projects. Consequently, the obligation to fund settlements is analogous to, and no less serious than, the United States' obligation to pay judgments rendered against it.

Nevertheless, interpretations of the federal trust responsibility vary from one Administration to another and require intensive discussions often on a settlement-by-settlement basis. Some prior Administrations have taken a narrow view of this trust responsibility and settlements that benefit non-Indians, asserting that federal contributions should be no more than the United States' calculable legal exposure which is difficult to determine. It has long been an accepted premise that the federal government should bear the primary responsibility for funding tribal settlements. Congress should consider the federal government's fiduciary duty towards the tribes and ensure that appropriations for authorized settlements are sufficient to ensure timely, fair and honorable resolutions of tribal claims. Such an approach not only serves the interest of the United States in ensuring successful resolution of tribal rights, but assists western states in resolving these difficult and potentially disruptive claims.

A. Funding During the Settlement Process

Tribes need federal funding to retain attorneys and experts to undertake the complex and costly legal and technical studies that are a mandatory prerequisite to any negotiation. States and tribes also rely on federal negotiating teams under the Indian Water Rights Office within the Department of the Interior, which provide one federal voice and expedites the settlement process. Failing to adequately fund these programs hinders the resolution of tribal claims, thereby prolonging uncertainty regarding state-issued rights. Thus, Congress and the Administration should fully fund the Indian Water Rights Office and provide tribes with sufficient resources to participate in the settlement process.

B. Authorizing Funding to Implement a Settlement

In the arid West, where water is scarce and tribal rights often pertain to fully-appropriated stream systems, settlements often require the construction of water storage and delivery projects to augment or allow existing water supplies to be used more advantageously by all water users. These projects generally do not reallocate water from existing non-Indian water users, but allow tribes to develop additional water supplies in exchange for foregone claims. Without federal monetary resources to build these projects, settlements are simply not possible in many cases.

While federal support is essential to settlements, a number of western states have also acknowledged that they are willing to bear an appropriate share of settlement costs. To this end, western states have appropriated tens of millions of dollars for existing settlements and devoted significant in-kind resources, including the administrative resources associated with the negotiation process and the value of their water rights.

C. Appropriating Funding For Settlements

Congressionally-authorized settlements are receiving funding, but there is a need for increasing appropriations. Moreover, the House Republican Conference adopted a moratorium on earmarks in the 112th Congress that apparently includes Indian water rights settlements. Settlements are not earmarks benefiting a specific state or congressional district, but represent trust obligations of the United States. They involve a quid-pro-quo in which tribes receive federal funding in exchange for waivers of tribal breach of trust claims against the federal government. If Congress is unable to implement settlements as a result of earmark reform, litigation will be the primary means of resolving tribal water right claims. This could result in decades of associated legal expenses and court-ordered judgments against the United States that would likely exceed the total costs of settlement, thereby increasing costs for federal taxpayers.

In addition, current budgetary policy (pay go) requires water rights settlement funding to be offset by a corresponding reduction in some other discretionary program. It is difficult for the Administration, states, and tribes to negotiate settlements knowing that funding is uncertain or may only occur at the expense of some other tribal or essential Interior Department program. Consequently, Congress should consider the unique legal nature of settlements, namely that the United States is receiving something of value in exchange for appropriating settlement funds and fulfilling its tribal trust responsibility, thereby avoiding potentially costly litigation.

D. The Reclamation Water Settlements Fund

In addition to the tool of direct appropriations which Congress has available to it to fund Indian Water Rights settlements, Title X of the Omnibus Public Lands Management Act, which became law in 2009, established a Reclamation Water Settlements Fund in the U.S. Treasury to finance Reclamation projects that are part of Congressionally-approved Indian water right settlements. The Fund will provide up to \$120 million per year for ten years with money transferred from the Reclamation Fund and prioritized for settlements in New Mexico, Montana, and Arizona. However, the Fund will not begin receiving money until FY 2020, leaving a significant gap in funding for various projects, the costs of which may increase significantly by FY 2020.

E. The Emergency Fund for Indian Safety and Health (EFISH)

One way Congress might address this gap is by appropriating money to the Emergency Fund for Indian Safety and Health (EFISH), authorized by Title VI of the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act 2008. EFISH currently authorized about \$600 million for water supply projects that are part of Indian water

settlements approved by Congress over a five-year period beginning October 1, 2008. This funding is above amounts made available under any other provision of law.

EFISH funding is only authorized through FY 2012, and the Administration has not yet requested money for EFISH in its budget requests. It is still in the process of creating a required spending plan for these funds. One way to address the absence of a federal spending plan might be for Congress to promptly appropriate authorized money into Reclamation's Settlements Fund, which already prioritizes funding in specified amounts for approved settlements.

VI. THE CONSEQUENCES OF NOT FUNDING SETTLEMENTS

If settlements are not authorized and funded, tribes may have no choice but to litigate their water claims. This is problematic because it may give them "paper rights," but may not provide them with a way of turning those rights into "wet water." Litigated outcomes could also provide tribes with senior water rights that could displace established state-issued water rights that are essential to meet non-Indian industrial, residential, and municipal needs in the West.

For instance, the Navajo Nation's settlement with New Mexico, which Congress has authorized, provides the Nation with an amount of water within New Mexico's Colorado River Compact allocation. The settlement still requires court-approval and could fail for a lack of appropriated funds. If it fails, the Navajo Nation would have little choice but to litigate its water rights claims. The United States has already filed claims on behalf of the Navajo Nation that exceed New Mexico's Colorado River apportionment under the Compact. If the United States and the Navajo Nation were to prevail on these claims, the allocation of water between the seven Colorado River Basin states could be jeopardized, disrupting the entire Southwestern economy.

Montana has also reached settlements with the Fort Belknap and Blackfeet Tribes as part of a state-wide adjudication process aimed at resolving its federal reserved water rights claims by 2020. However, until Congress authorizes these settlements, state-issued water rights in basins where these tribes have claims will remain in limbo. If Congress delays authorization, the tribes may litigate their claims in court, which could disrupt established non-Indian uses.

In addition to the previously mentioned costs associated with litigated outcomes, postponing the implementation of Indian water rights settlements will be far more expensive for the federal government in the long-run because increasing water demands, decreasing water supplies, and other factors will only increase the costs of resolving these claims.

VII. CONCLUSION

The national obligation to Indian water rights settlements is a finite list that grows shorter with each settlement. Nevertheless, the cost of implementing them will only continue to rise. Postponing this duty only increases its costs to the federal government, perpetuates hardships to Indians, and creates uncertainty for all water users, hindering effective state and regional water planning and development and economic investment and security. The WSWC appreciates the opportunity to testify on this important matter and looks forward to working with the Committee and Congress to support the negotiated resolution of Indian water rights claims.